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No. 08A332

In The Supreme Court Of The United States

JENNIFER BRUNNER,
OHIO SECRETARY OF STATE,
Applicant,

v.

OHIO REPUBLICAN PARTY, *et al.*,
Respondents.

ON APPLICATION FOR STAY FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPLICATION FOR A STAY OF A TEMPORARY RESTRAINING ORDER

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INTRODUCTION

Ohio Secretary of State Jennifer Brunner ("Secretary") urgently asks this Court to restore order to Ohio's election, which was destabilized by a sharply divided en banc Sixth Circuit based on a flawed understanding of a simple provision of federal law.

In a suit filed just weeks before Election Day, Plaintiffs Ohio Republican Party, et al. ("ORP"), argued, among other things, that the Secretary's statewide voter registration database does not comply with the Help America Vote Act, 42 U.S.C. § 15481 *et seq.* ("HAVA"). That very database has been in place since 2004 without challenge by ORP. It was used in the 2006 general election and in the 2008 presidential primaries just last spring.

In a temporary restraining order ("TRO") hearing held less than a month before Election Day—and after in-person absentee voting in Ohio had already begun—the district court denied the Secretary's request to call witnesses who could explain how the complex database system works. Instead, without the benefit of testimony, the district court on Thursday, October 9, 2008, ordered the Secretary, in effect, to reprogram her database to the court's specifications by Friday, October 17. Last night the en banc Sixth Circuit affirmed the district court's TRO. As things now stand, the Secretary must reprogram the statewide voter registration database by Friday—after Ohioans have begun voting, and as she and the 88 county boards of elections are undertaking other efforts to ensure that the general election in Ohio will be a smooth one.

This Court should stay the TRO for two clear reasons. First, it is baseless. ORP has shown *no* likelihood of success on the merits, because ORP has no private right to enforce HAVA in a suit under 42 U.S.C. § 1983. This Court has explained that "if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms," *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002), and the HAVA provision at issue contains no such clear language. Thus, ORP never should have been allowed through the courthouse door on its HAVA claim in the first place. Now that is *has* been allowed in, a flood of lawsuits across the nation could follow from plaintiffs of either political party who will argue that HAVA entitles them to a federal court hearing on vague claims concerning state officials' administrative actions. Those lawsuits will interfere with other state election officials' efforts to administer smoothly the election and disrupt the careful federal-state balance that HAVA embodies. Congress intended no such result.

Second, the needs for a stay here are weighty. The Secretary and county boards of elections have vitally important jobs to do in preparing Ohio for this historic election. In close coordination with one another, they are taking numerous steps to verify the accuracy of the voter registration lists, to confirm voters' eligibility, and to prevent various forms of fraud in the election. If the TRO remains in place, mismatches may well be used at the county level unnecessarily to challenge fully qualified voters and severely disrupt the voting process.

What is more, the Secretary, in full acknowledgement of the district court's authority, is now undertaking her best efforts to comply with the TRO. The district

court's strict deadline, however, necessarily requires the Secretary to dedicate a large number of staff members' full attention to implementing the court's order, thereby diverting resources from the Secretary's regular (and critical) election-administration duties. Implementing the order is also highly challenging; it is not an easy task to accommodate the district court's requirements by altering a complex, four-year-old database that the current Secretary did not create and that interacts with 88 county databases and another state agency's database. This reprogramming also requires the Secretary to run extensive tests to ensure the accuracy of the information provided.

Moreover, even if the Secretary's diligent efforts to comply with the TRO were to succeed, the effects of the changes to the database are uncertain, to say the least. Having been denied the opportunity to call a single fact witness, the Secretary was never able meaningfully to explain to the district court the possible consequences of ORP's proposed changes. This Court has explained that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006) (per curiam). In light of "the imminence of the election and the inadequate time to resolve factual disputes," the district court here, as in *Purcell*, should have "allow[ed] the election to proceed without an injunction" altering the voter-registration database that has been in place for past statewide elections. *Id.* at 8; *see also id.* (Stevens, J., concurring) ("[T]he Court wisely takes action that will

enhance the likelihood that [constitutional issues] will be resolved correctly on the basis of historical facts rather than speculation.").

Finally, even as the Secretary devotes enormous resources in an effort to comply with the TRO, looming over her is the threat of contempt if she fails to meet the district court's strict deadline tomorrow. And with the federal courts' doors now opened to private claimants asserting rights under HAVA's computerized registration list requirement, it is difficult to predict what additional lawsuits might follow, with additional threats of sanctions. Such litigation poses a substantial risk of undermining confidence in the electoral system.

The bottom line is therefore quite simple: The district court abused its discretion when, with no factual development, it entered a TRO that disrupted the electoral process in Ohio shortly before Election Day, and in a suit that could have been brought years ago and that was not proper in the first instance. An immediate stay is warranted.

STATEMENT OF THE CASE AND FACTS

Congress enacted HAVA in 2002 to require, among other things, that States adopt statewide computerized databases containing "the name and registration information of every legally registered voter in the State." 42 U.S.C. § 15483(a)(1)(A). The chief state election official must also enter an agreement with the state motor vehicle authority to match information to verify the accuracy of the information provided on applications for voter registration. *Id.* § 15483(a)(5)(B)(i).

To comply with HAVA, the Ohio Secretary of State implemented a system of interfacing computer databases that allows Ohio election officials to verify voter registration rolls. In June 2006, the then-Secretary programmed the database so that it did not provide notification to counties of certain mismatches. Under the then-Secretary's watch, this database system was used during the 2006 general election in Ohio. The current Secretary inherited that database when she took office in January 2007, and she used the database, unchanged, during the March 2008 presidential primary in Ohio.

On Friday, September 26, 2008—only four days before voting began in Ohio—the Ohio Republican Party ("ORP") sued the Secretary, seeking a temporary restraining order and injunctive relief. Compl., Dist. Ct. Dkt. No. 2. Among other things, ORP's complaint alleged that the Secretary "violate[d] both the letter and the spirit of HAVA," *id.* ¶ 48, by "failing to verify voter registration against [a statewide] computerized database." *Id.* ¶ 45. In the initial round of TRO briefing, ORP focused on closing the five-day window under Ohio law during which a voter was authorized to both register to vote and simultaneously submit an absentee ballot. The district court denied a TRO pertaining to this window, but it granted a TRO ordering the Secretary to permit election observers at all boards of elections and polling places during the absentee-voting period. TRO Order 1, Dist. Ct. Dkt. No. 27.

Both the Secretary and ORP filed emergency requests for relief with the Sixth Circuit, and the Sixth Circuit granted the Secretary's motion to stay the TRO.

Ohio Republican Party v. Brunner, Nos. 08-4242, 08-4243-08-4251, 2008 U.S. App. LEXIS 20677 (6th Cir. Sept. 30, 2008).

ORP then returned to the district court and filed a "Renewed Motion for Temporary Restraining Order Following Interlocutory Appeal" on Sunday, October 5, 2008—six days after voting had begun. Renewed TRO Mot., Dist. Ct. Dkt. No. 36. That motion asked the district court to rule on ORP's HAVA claims. *Id.* at 1-2. The Secretary opposed the motion, Opp. to Renewed Mot. (Oct. 8, 2008), Dist. Ct. Dkt. No. 43, and asked for a hearing on the TRO request, noting that the "factual issues raised in the Plaintiffs' filing would be best addressed by means of a hearing" at which the Secretary could cross-examine ORP's affiants and explain the voter database. Secretary's Mot. for Hr'g at 1 (Oct. 8, 2008), Dist. Ct. Dkt. No. 42. The district court granted the motion for an oral hearing but denied the Secretary's request for an opportunity to cross-examine ORP's affiants and to present testimony concerning the statewide database. Order on Mot. for Hr'g (Oct. 8, 2008), Dist. Ct. Dkt. No. 47.

Following an oral hearing as well as an in-chambers conference to which the district court invited the media, the court again granted a TRO. Op. & Order ("TRO Order II"), Dist. Ct. Dkt. No. 52. The Order required the Secretary to provide "effective access" to voter mismatch information. *Id.* at 16.

The Secretary filed an emergency motion with the Sixth Circuit requesting the court to vacate or stay the district court's TRO. Secretary's Emergency Mot., 6th Cir. No. 08-4322 (Oct. 10, 2008). In response to the Secretary's motion, ORP

petitioned the Sixth Circuit for initial en banc review and filed a response brief. The Secretary, on the court's order, responded to the initial en banc petition, but time did not allow the filing of a reply brief before the Sixth Circuit panel acted.

On Friday evening, October 10, 2008, the three-judge panel granted the Secretary's emergency motion to stay the district court's TRO. 6th Cir. Panel Op. at 2. While the panel did not resolve the issue of whether HAVA creates a private right of action, the panel concluded that the district court abused its discretion in granting the TRO. *Id.* at 5, 6. Applying the plain language of the statute, the panel found that "Ohio is likely in compliance with HAVA." *Id.* at 8. Accordingly, the panel concluded, "the likelihood that ORP will succeed on the merits is slight and the likelihood that the Secretary will succeed is great." *Id.* at 9. The panel also recognized the substantial harm the district court's TRO poses. *Id.* at 10.

The next day—Saturday, October 11, 2008—ORP filed a one-page renewed petition for immediate rehearing en banc. The Secretary did not have an opportunity to respond to this petition. (Under Fed. R. App. P. 35, a party may respond to a petition for rehearing en banc only after the court requests a response; the Sixth Circuit did not request a response.)

On the afternoon of Tuesday, October 14, 2008, the Secretary issued a press release explaining that she directed Ohio's county boards of elections to "thoroughly review and investigate specific allegations of voter registration fraud, illegal voting, or voter suppression." Press Release, Ohio Secretary of State (Oct. 14, 2008) (attached as Ex. 1). She also requested the boards to assist in crafting a solution

that meets three key metrics: (1) create a uniform process to properly utilize information about mismatches; (2) protect voters from purges based on a mismatch; and (3) protect boards from litigation by ensuring compliance with federal law, which does not allow systematic purges within 90 days of a federal election. *Id.* Finally, the Secretary explained that once a solution is developed, "we will upgrade our voter query system and will issue instructions to guide counties in their use of this information." *Id.*

On the evening of Tuesday, October 14, 2008, a divided Sixth Circuit, sitting en banc, vacated the panel's order and denied the Secretary's motion to stay the district court's TRO. 6th Cir. En Banc Op. at 15. The en banc court first disagreed with the panel's interpretation of HAVA, *id.* at 5, and therefore concluded that ORP was likely to succeed on the merits. Second, the en banc court rejected the Secretary's risk-of-harm arguments. *Id.* at 7-9. Finally, the en banc court did not decide the "close" question of whether HAVA creates a private right of action. *Id.* at 12-13. Instead, according to the en banc court, the district court was within its discretion, because this question is a difficult one, to conclude that ORP has a private right of action under HAVA. *Id.* at 13. Six judges dissented.

ARGUMENTS IN FAVOR OF A STAY

Either Justice Stevens as circuit justice or the Court as a conference has the power to stay a lower court's order. *See Emmett v. Johnson*, No. 07A304, 2007 U.S. LEXIS 11679 (Oct. 17, 2007); *San Diegans for Mt. Soledad Nat'l War Mem'l v. Paulson*, 126 S. Ct. 2856 (2006) (Kennedy, J.); *Mikutaitis v. United States*, 478 U.S.

1306 (1986) (Stevens, J.). A stay is required here because ORP has shown no likelihood of success on the merits of a claim that never should have been brought in federal court, let alone so close to the election.

A. HAVA does not confer a private right of action that ORP can enforce under § 1983.

The law is clear that ORP has no rights under HAVA that are enforceable in a § 1983 action. ORP's likelihood of success on this issue is therefore nil. In stating that "there are several reasons for accepting the district court's probability-of-success-prediction on this issue," 6th Cir. En Banc Op. at 11, the en banc court ignored this Court's, and its own, well-settled § 1983 precedent.

For a statute to be enforced in a § 1983 suit, Congress must have clearly intended to create a private right. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-85 (2002). By its plain terms, § 1983 provides a remedy only for "*rights*, not the broader or vaguer 'benefits' or 'interests'"; thus, the question is "whether Congress *intended to create a federal right*." *Id.* at 283. To "unambiguously confer[]" a privately enforceable right, *id.*, the statutory "text must be 'phrased in terms of the persons benefited,'" *id.* at 284 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 692 n.13 (1979)). Moreover, even where "explicit rights-creating terms" exist, "a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'" *Id.* (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)). It is not enough for a statute to "'speak[] in terms of rights,'" *id.* at 289 n.7 (quoting *Pennhurst State Sch.*

& Hosp. v. Halderman, 451 U.S. 1, 18-20 (1981) (internal quotation marks omitted)), with an "'aggregate' focus," *id.* at 288 (quoting *Blessing v. Freestone*, 520 U.S. 329, 288 (1997)). Instead, the statute must show a "concern[] with 'whether the needs of any *particular person* have been satisfied.'" *Id.* (quoting *Blessing*, 520 U.S. at 343) (emphasis added).

The HAVA provision under which ORP seeks relief—HAVA section 303, codified at 42 U.S.C. § 15483(a) (cited at Compl. ¶ 42)—in no way reflects a congressional intent to protect particular persons by creating a privately enforceable right. HAVA section 303 concerns statewide registration databases. It requires Ohio, "through [its] chief election official"—the Secretary—to "implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list." 42 U.S.C. § 15483(a)(1)(A). The database must "contain[] the name and registration information of every legally registered voter in the State and assign[] a unique identifier to each legally registered voter in the State," *id.*, and "[t]he computerized list," in turn, "shall serve as the official voter registration list for the conduct of all elections for Federal office in the State," *id.* § 15483(a)(1)(A)(viii). Section 303 imposes on the Secretary additional administrative duties related to the database. *Id.* § 15483(a). The provision addresses only the obligations of state election officials; nowhere does it discuss the rights of individuals or even groups.

Congress's singular focus in HAVA section 303 on state officials' administrative duties is underscored by the remedies it supplied for shortcomings in

the discharge of those duties. *See Gonzaga*, 536 U.S. at 289 (explaining that the failure of the Family Educational Rights and Privacy Act of 1974 ("FERPA") "to confer enforceable rights is buttressed by the mechanism that Congress chose to provide for enforcing those provisions"). As part of the administrative scheme, Congress required each State to establish an administrative complaint procedure for resolving grievances under the statute. 42 U.S.C. § 15512. Congress also authorized the United States Attorney General to bring a civil action to enforce HAVA against the States, 42 U.S.C. § 15511—much as FERPA provided for enforcement by the Secretary of Education, *see Gonzaga*, 536 U.S. at 289. Congress would have had no reason to create these review mechanisms if it believed citizens already had a private cause of action under the statute.

Despite *Gonzaga*'s clear guidance on this issue, the en banc Sixth Circuit thought the question was a close one because the Sixth Circuit had held in an earlier case—*Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004) (per curiam)—that a *different* provision of HAVA *does* confer a private right of action under § 1983. Even assuming that *Sandusky County* is correct,[1] the en banc court ignored the stark textual differences between HAVA section 303, at issue here, and HAVA section 302, at issue in *Sandusky County*. HAVA section 302 deals with provisional ballots. It provides:

> If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the

[1] This Court has never confirmed that section 302 confers a private right of action enforceable under § 1983, and the United States has taken the contrary position. *See* Br. for United States as Amicus Curiae, *Sandusky County Democratic Party v. Blackwell*, Nos. 04-4265, 04-4266 (6th Cir.), *available at* http://www.usdoj.gov/crt/voting/hava/oh_brief.htm.

> individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot [consistent with certain requirements].

42 U.S.C. § 15482(a). In holding that "[t]he rights-creating language of HAVA § 302(a)(2) is unambiguous," the *Sandusky County* court noted that the provision's text "mirrors the rights-creating language of Title VI of the Civil Rights Act of 1964 and Education Title IX of the Amendments of 1972, which both state that 'no person . . . shall . . . be subjected to discrimination.'" *Sandusky County*, 387 F.3d at 572-73. Section 303, by contrast, contains no such language. Instead, section 303's text, as explained above, is directed wholly toward state election officials on issues related to the statewide voter registration database. Section 303 has nothing to say about individuals' rights pertaining to the administrative database.

The en banc majority wondered why Congress would create two "halves of HAVA," one of which—section 302 pertaining to provisional ballots—is privately enforceable, the other of which—section 303 pertaining to the statewide database—is not. 6th Cir. En Banc Op. at 13. Again, assuming that *Sandusky County* was correct that section 302 confers a privately enforceable right, Congress's intent is hardly inexplicable. Congress did in fact intend the legislation to have two halves with two different, but related, purposes. In section 302, Congress intended to protect individuals' right to vote, so long as they were properly registered, by means of a provisional ballot. Because that provision specifically addressed the individual right to vote, Congress understandably made it privately enforceable. In section

303, on the other hand, Congress created an administrative scheme—a statewide computer database maintained by state and county election officials. These two halves were designed respectively "to make it easier to vote and tougher to cheat." 148 Cong. Rec. S10488 (daily ed. Oct. 16, 2002) (statement of S. Bond). And as with other administrative schemes—like FERPA, for instance, *see Gonzaga*, 536 U.S. at 289—Congress intended to remedy violations of that administrative scheme through administrative means.

In allowing a private HAVA suit to go forward under § 1983, the en banc Sixth Circuit has thrown open the doors of federal courthouses to potentially countless lawsuits as Election Day approaches. Any eligible voter now may enforce any administrative provision of HAVA simply by claiming—without evidentiary support—that voter fraud is occurring. That is not what Congress contemplated. HAVA struck a careful federal-state balance. *See Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1168 (11th Cir. 2008). It enacted provisions to ensure the right to vote through provisional ballots and created an administrative scheme to ensure that States have computerized voter databases. But in deference to the States' traditional control over local election matters, it expressly left "[t]he specific choices on the methods of complying with" HAVA's requirements "to the discretion of the State[s]." 42 U.S.C. § 15485; see also Gonzaga, 536 U.S. at 286 n.5 (stating that inferring a private remedy under FERPA would require a "judicial assumption, with no basis in statutory text, that Congress intended to set itself resolutely against a tradition of deference to state and local school officials").

The question whether HAVA section 303 is enforceable through § 1983 is not a close one. Because HAVA section 303 contains no rights-conferring language, it cannot form the basis of a civil rights action under § 1983. Thus, there is *no* likelihood that ORP will succeed on its HAVA claim.

B. The en banc Sixth Circuit ignored this Court's clear admonition in *Purcell* not to enjoin state electoral processes close to Election Day without careful factual development.

In no uncertain terms, this Court has discouraged judicial orders that enjoin electoral processes close to Election Day. In *Purcell*, the Court summarily reversed a Ninth Circuit order that enjoined enforcement of an Arizona voter-identification requirement several weeks before the election. The Court explained that the circuit court, "[f]aced with an application to enjoin operation of voter identification procedures just weeks before an election . . . was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases." 127 S. Ct. at 7. The Court added: "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Id.* Thus, in light of "the imminence of the election and the inadequate time to resolve factual disputes," the Court vacated the Ninth Circuit's order and "allow[ed] the election to proceed without an injunction suspending the voter identification rules." *Id.* at 8.

The Sixth Circuit's decision to affirm the district court's TRO contravenes the teachings of *Purcell* in three ways. First, it endorses the filing of litigation on the

eve of an election. Second, it relieves plaintiffs from having to produce any facts in support of their arguments for extraordinary equitable relief. And third, it ignores the real and tangible dangers that such last-minute meddling can have on the electoral process.

1. The Sixth Circuit's excusal of ORP's eleventh-hour filing was wrong because the change to the database about which ORP is concerned occurred more than two years ago, and ORP had no explanation for sitting on its hands.

Purcell's admonition carries even greater force in this case, where the party seeking to enjoin the electoral process could have filed suit earlier. "As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made, and [a party's] claim to . . . serious injury becomes less credible by his having slept on his rights." *Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980).

The Secretary began implementing HAVA's requirements before the current Secretary even took office in January 2007. From as early as 2004, the Secretary's office has been working with the Bureau of Motor Vehicles and county boards of elections to create statewide voter registration database as HAVA requires. The Secretary inherited the current version of the database from her predecessor, and both the 2006 general election as well as Ohio's March presidential primary took place with this very database in place. ORP never objected to the database before this election cycle. ORP's first objection to the database's operation appeared on September 26, 2008, when it filed its complaint.

Although the en banc court excused ORP's tardiness on the ground that "[a]ll of this came to a head . . . when the Secretary issued her August advisory," 6th Cir. En Banc Op. at 9, that explanation is flatly incorrect. The document to which the Sixth Circuit referred—Directive 2008-63—stated that prospective voters could, during a five-day window in early October, register to vote and cast an absentee ballot at the same time. *See State ex rel Colvin v. Brunner*, No. 2008-1813, 2008 Ohio Lexis 2588 (Ohio Sept. 29, 2008) (affirming the advisory's interpretation of state law); *see also* Directive 2008-63: Processing Voter Registration Applications Received the Week Immediately Preceding a Voter Registration Deadline (Aug. 13, 2008), *available at* http://www.sos.state.oh.us/SOS/Upload/elections/directives/2008/Dir2008-63.pdf. It did *not* address the Secretary's existing policies pertaining to the statewide voter database. Therefore, contrary to the en banc court's erroneous suggestion, the current Secretary in Directive 2008-63 did not change "the office's prior policy on implementing § 15843(a)(5)(B)(i)." 6th Cir. En Banc Op. at 10. Had ORP approached her earlier, the Secretary would have had ample time to review the database's existing functionality and to consider carefully any requests or suggestions for improving it.

Nor should ORP be excused from its last-minute filing because Ohio officials publicly encouraged parties to this fall's election to resolve disputes early and, if possible, by means other than litigation. *See id.* at 9-10. ORP did not take that opportunity to flag issues pertaining to HAVA. More to the point, far from having

caused ORP's late filing, that encouragement was designed to *prevent* circumstances precisely like this one.

2. The Sixth Circuit excused ORP of its burden to establish irreparable harm.

When the looming deadlines of an election preclude an evidentiary hearing, *Purcell* counsels courts to steer away from equitable relief, not toward it. *See* 127 S. Ct. at 8 ("Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules."). In the face of that clear guidance, the district court here took the opposite path. Despite having ample time for adversarial testing of ORP's claims, the court denied the Secretary's request for an evidentiary hearing, accepted ORP's allegations of voter fraud at face value, and issued the TRO.

The en banc court improperly endorsed that route, brushing *Purcell* aside by saying "it is unclear why it ought to control" this circumstance, as "there [was] sufficient time to resolve . . . fact disputes" between the parties. 6th Cir. En Banc Op. at 10. This is a perversion of *Purcell*, which gave the district court two options. The court could have (and should have) conducted a limited factual inquiry into the basis of ORP's TRO request, or it could have denied the TRO request if there was not sufficient time for factual inquiry. The district court instead chose, and the Sixth Circuit endorsed, a third route—grant the TRO without any factual hearing. The consequences of that choice are now evident: The en banc panel's analysis is rife with factual allegations that are either inaccurate or incomplete. *See, e.g., id.* at

10 ("To this day, it remains unclear when the Secretary told the public that she had changed the office's prior police on implementing § 15843(a)(5)(B)(i) . . . ."); *id.* ("Nor . . . are the plaintiffs challenging an *established* election practice of the State. The established practice in this case is the one the State used in the last national election, not the Secretary's innovation of it for this one."). The Secretary has innovated nothing here; the database at issue was developed and implemented by her predecessor and operated by her without significant change.

Furthermore, in weighing the relative harms to the parties, the en banc court emphasized the need to "preserv[e] the value of each vote from the diluting effects of fraud" and the fact that "[t]he window to detect and deal with vote-diluting fraud" was rapidly closing. 6th Cir. En Banc Op. at 7-8. But this analysis ignores the fact that the record contains no evidence of actual voter fraud, only rank speculation that out-of-state residents are flooding into Ohio, registering to vote with false social security numbers and addresses. *See* ORP's Renewed Motion for TRO at 6, Dist. Ct. Dkt. No. 36. Under the Sixth Circuit's framework, a party need only invoke the *specter* of voter fraud to meet its burden of showing irreparable injury and obtain a TRO. Today, it is "the opportunity to follow up on voter-registration mismatches." 6th Cir. En Banc Op. at 8. Tomorrow, it will be voter identification. The day after, it will be election-day poll monitoring.

The imminence of an election does not justify a departure from the well-established requirements for obtaining temporary injunctive relief. Otherwise, the

Secretary's attention will be directed at a torrent of last-minute TRO orders, and the accompanying threat of sanctions, rather than overseeing a statewide election.

3. The Sixth Circuit ignored a real and substantial threat of disruption to the upcoming election.

The en banc court repeatedly criticized the Secretary's concerns about reprogramming the statewide database, and the accompanying disruption on the electoral process, as unsupported by evidence. *See, e.g.*, 6th Cir. En Banc Op. at 14-15 ("[O]ne of the key obstacles to the Secretary's request for relief is the lack of any affidavit or other factual support for her arguments that altering the relevant computer programs will be difficult or create material risks to other aspects of the election process."). This charge is neither fair nor accurate.

The charge is not fair because the Secretary had no opportunity, given the district court's highly unusual proceedings, to introduce the evidence that the Sixth Circuit later found lacking. On the question of HAVA compliance, the Secretary faced a moving target. ORP originally alleged that the Secretary was not performing any matching between her database and the BMV. *See* ORP's Renewed Motion for TRO, at 6 (Dist. Ct. Dkt. 36) ("[T]he voter registration database does not instantly match the information against the records of the Bureau of Motor Vehicles."). The Secretary crafted her response based on this theory and submitted several relevant affidavits.

After precluding the Secretary from offering any live testimony about the functionality of the database, the district court decided that, although the statewide database *did* match information with the BMV's records, the Secretary violated

HAVA because the database did not allow for an "effective way to identify or isolate mismatches from the rest of the pile" through batch sorting or listing. TRO Order II at 11. In light of this moving target and the district court's refusal to allow witnesses at the hearing, the Secretary cannot now be faulted for failing to develop the factual record on her claims of irreparable harm.

Nor is it accurate to say that the electoral process will not be disrupted.[2] On the contrary, the Secretary's experience thus far in attempting to comply with the TRO shows that the district court's order is highly disruptive. Although the district court afforded only a short window of time for the Secretary to comply with the TRO, the Secretary immediately directed her staff to take all necessary steps to comply with the TRO. Thus far, the Secretary has been able only to reprogram the database to produce rudimentary batch lists of mismatches. Those batch lists, however, will display myriad discrepancies between the database, BMV records, and social security records. Many of those discrepancies bear no relationship whatsoever to a voter's eligibility to vote a regular, as opposed to a provisional, ballot. Furthermore, voters may, consistent with state law, provide either a social security number or Ohio driver's license number at the time of registration (or, if the registrant has neither, the State assigns a unique identifier). For those voters who provided neither a social security number nor a driver's license number, the

[2] The Secretary asserted before the Sixth Circuit that "the TRO threatens to throw Ohio's entire statewide database . . . into chaos" because, among other things, the database would soon "be used to make the State's poll books." Secretary's Emergency Mot. at 2. Although the Secretary believed that assertion to be true at the time she filed her brief on a tightly compressed timetable, she now believes, based on later-discovered information, that the TRO will not affect the poll books. It will, however, affect other electoral processes.

Secretary's preliminary assessment is that system will automatically return a mismatch, and that a significant majority of the mismatches reported on these batch lists will be erroneous.

As contemplated by the district court, the Secretary must transmit these master lists to the county boards of elections by this Friday, October 17. Once this batch of information is released, the potential for disruption to the electoral process becomes palpable and irreversible.

First, the county boards of election will be faced with an inordinate number of mismatches to sift through.[3] Because the National Voter Registration Act prevents the systematic cancellation of voter registrations less than 90 days before an election, *see* 42 U.S.C. § 1973gg-6(c)(2)(A), the county boards may not, as a wholesale matter, disqualify each of these mismatched registrants. Instead, each mismatch will require an individualized determination by the county boards. And those boards do not have the resources to review the voter lists in the next two weeks to determine whether mismatches are worthy of disqualification, given boards' many other election-related responsibilities.

Second, the Secretary has not yet developed procedures and standards to govern mismatch determinations, nor, at this late juncture, can she train and assign staff to oversee and consult with the 88 county boards when they begin

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[3] While the statutory deadline for private individuals or groups to file challenges against Ohio voters passes today, interested parties such as ORP may also ask the boards to investigate mismatches before Election Day. *See* Ohio Rev. Code § 3509.07 ("The vote of any absent voter may be challenged for cause in the same manner as other votes are challenged, and the election officials shall determine the legality of that ballot."); *see also* 6th Cir. En Banc Op., at 7 ("At most, the identification of a mismatch allows a county board to investigate whether a mismatch has a legitimate explanation.").

reviewing the mismatches. Such policies and procedures are normally drafted and promulgated months before Election Day after full consultation with local elections officials, political parties, and interested groups. Any effort to complete these tasks now will inevitably cause confusion and inconsistency across the state.

Third, this dynamic will trigger litigation by voters and voter groups claiming that they have been improperly disenfranchised on the eve of the election. *See* Br. of ACLU of Ohio, et al., at 7, *Republican Party of Ohio v. Brunner*, No. 08-4322 (6th Cir.) ("Latino citizens are susceptible to problems matching compound names, and African Americans are frequently not matched because of their use of unique names, or derivative spellings of common names."). Furthermore, the potential for variation in mismatching decisions by the 88 county boards of election will all but invite an equal protection challenge. *See Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam) (emphasizing the need for "adequate statewide standards for determining what is a legal vote," "practicable procedures to implement them," and "orderly judicial review of any disputed matters that might arise").

As a final matter, the en banc court stated that "[n]othing about Judge Smith's order will limit a single individual's right to vote in the normal process or at minimum through a provisional ballot." 6th Cir. En Banc Op. at 8. This perspective is short-sighted. *Purcell* is plainly concerned with the effects of judicial intervention on the electorate. *See* 127 S. Ct. at 7 ("[T]he possibility that qualified voters might be turned away from the polls would caution any district judge to give

careful consideration to the plaintiffs' challenges."). As Judge Moore correctly observed:

> Because of the time limitations, voters whose information does not match may not be aware that there is any question about their registration and may not have to be able to obtain the documents necessary to further verify their registrations. It is unlikely that the state can properly investigate all of the mismatches created by the TRO, and as a result, properly registered voters will likely be forced to cast provisional ballots, will believe that they cannot vote, or will be turned away at the polling places.

6th Cir. En Banc Op. (Moore, J., dissenting), at 16. If the Sixth Circuit's decision is allowed to stand, an untold number of legitimate voters in Ohio will be forced to reestablish the bona fides of their vote before the county boards of elections, or they will stay home out of frustration or confusion. ORP's unsupported invocations of voter fraud hardly warrant such monumental interference with the electoral process.

CONCLUSION

The Court should grant the request for an emergency order staying the temporary restraining order.

Respectfully submitted,

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